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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 271

ALCOA STEAMSHIP COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 30–37) is reported at 80 F. Supp. 158. The opinion of the United States Court of Appeals for the Second Circuit (R. 40–46) is reported at 175 F. 2d 661.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1949 (R. 46). The petition for a writ of certiorari was filed on August 16, 1949, and was granted on October 10, 1949

(R. 53). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether an ocean carrier may compel the United States to pay full freight to destination on Government cargo, shipped under the standard form Government bill of lading, which was lost and never delivered.

STATUTE AND CONTRACT PROVISIONS INVOLVED

The statute prohibiting advance of public money, R. S. 3648, provides in pertinent part as follows:

> No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *

The standard form Government bill of lading (Form No. 1058, approved August 24, 1928; 8 Comp. Gen. 698) (Ex. 11, R. 72A–72B), standard form Government voucher (Form No. 1068, approved June 26, 1931; 10 Comp. Gen. 588) (Ex. B, R. 74A–74B), and petitioner's commercial form ocean bill of lading (Ex. 10, R. 69–71) are printed in pertinent part, *infra*, pp. ~~13, 24, 26~~ 16, 25-35, ~~28–31, 33~~ 34.

STATEMENT

This action was brought by petitioner against the United States for the recovery, under the Tucker Act, now 28 U. S. C. 1346, of $3,520.52 which the Comptroller General had collected from it by offset and deduction from other monies concededly due petitioner. The facts giving rise to the claim of the United States to collect $3,520.52 from petitioner by deduction are undisputed.

On or before June 13, 1942, the War Department shipped a Government cargo of lumber, under the standard form Government bill of lading, from Mobile, Alabama, to Port of Spain, Trinidad, on petitioner's S. S. *Gunvor* (R. 25). On June 14, 1942, with the Government cargo aboard, the *Gunvor* was lost at sea by enemy action before reaching its destination (R. 29). A claim for payment of freight on the lost Government cargo, in the amount of $3,520.52, was subsequently presented by petitioner on the prescribed Government freight voucher (Ex. B, R. 74A–74B), and payment was made by the War Department on or about September 15, 1942 (R. 29). Upon audit of the account, the Comptroller General took exception to the payment on the ground that the freight had not been earned, and on July 24, 1944, petitioner was advised that a deduction would be made from an amount otherwise due unless the overpayment was refunded within sixty days (R. 29; Ex. 8, R. 67–68). On

February 2, 1946, refund not having been made by petitioner, collection was effected by deduction (R. 29).

The District Court for the Southern District of New York concluded from these facts that petitioner, under the terms of the Government bill of lading, had earned the freight and that the sum of $3,520.52 was improperly deducted by the Comptroller General (R. 30–37). On appeal, the Court of Appeals for the Second Circuit (one judge dissenting) reversed, holding that the standard form Government bill of lading "asserted the privilege of any shipper under the admiralty law that it should not pay for what it does not get" (R. 42).

SUMMARY OF ARGUMENT

This case presents the question whether the United States is liable for payment of ocean freight upon a shipment of Government cargo which was lost and never delivered. The primary problem is one of construing the standard form Government bill of lading together with petitioner's commercial form bill of lading, in so far as it is incorporated therein by reference, as an entire contract of carriage. A further issue is raised as to whether an agreement to pay freight to destination on Government cargo not delivered to destination is prohibited by R. S. 3648.

I

It is well settled as a matter of general maritime law that, absent express agreement to the contrary, a carrier does not earn and may not claim payment of freight until it has delivered the cargo to destination. Petitioner's essential contention is that Article 6 of its commercial form bill of lading, which provides that freight shall be due whether or not the cargo is delivered, must be given full effect unless precisely contravened by some specific provision designed to meet and offset it, in the standard form Government bill of lading. As the basis for this approach to the construction of the contract of carriage, petitioner implies that Article 6 of its bill of lading has been uniformly embodied in the usual form commercial bill of lading and has been raised to the status of a general maritime rule. We submit that, in fact, petitioner's assertions as to general maritime law are supported neither by judicial precedent nor, in so far as the issue here concerned is concerned, by commercial practice. A shipper may, as noted by the court below, insist upon full performance of the transportation service as the condition upon which freight will be paid.

Analysis of the standard form Government bill of lading reveals, as the court below held, a "carefully devised plan" whereby payment of

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freight is conditioned upon delivery of the cargo to destination. The obligation to pay freight and the transportation service which must be performed in order to give rise to that obligation—a matter as to which the Government's requirement for uniformity is obvious—is completely covered within the four corners of the standard form Government bill of lading. Lack of uniformity among carriers with respect to the creation of an absolute obligation to pay freight, in itself, makes it plain that the Government could not have intended indiscriminately to incorporate by reference into its standard form whatever provision the particular carrier might employ. The clear meaning of the provisions contained in the standard form Government bill of lading and the obvious fiscal policy which supports that plain meaning is backed by more than a century of consistent administrative interpretation and practice.

II

That the construction herein urged by the Government of the standard form Government bill of lading is correct is evidenced by the provisions of R. S. 3648 which, in itself, prohibits the type of contract which petitioner asserts was here executed. That statute provides that "* * * in all cases of contracts for the performance of any service, * * * for the use of the United States, payment shall not exceed

the value of the service rendered * * *." Petitioner insists, by virtue of Article 6 of its commercial form bill of lading, that "value," sufficient to support the absolute obligation to pay full freight to destination, has been rendered upon receipt of the cargo at point of shipment. However, this Court and lower federal courts, have upheld such clauses, not on the theory that freight is earned upon receipt of the cargo for shipment but because the shipper has bargained away its right to insist upon complete performance of the contract of carriage. Thus, although there may be consideration which constitutes "value" sufficient, as a matter of contract law, to uphold such a stipulation between commercial shippers and carriers, such consideration is clearly not the "value of the service rendered" to the Government which is contemplated by R. S. 3648.

ARGUMENT

INTRODUCTORY STATEMENT

The question presented in this case is whether the United States becomes obligated, under the standard form Government bill of lading, for the payment of ocean freight upon a shipment of Government cargo as soon as the cargo is received at the port of origin by the carrier. The Government's position is that freight on Government cargo must be earned by delivery to destination and that the United States does not and

cannot lawfully obligate itself to pay freight for a transportation service not performed. Petitioner, on its own behalf and as representative of other ocean carriers (Pet. 12), insists that the Government's obligation to pay freight arises at the port of origin and is absolute without regard to subsequent performance of the contract of carriage by delivery of the cargo to destination. Petitioner charges the Government with this absolute obligation on the basis of the unearned freight clause in its commercial form bill of lading. The position of the respondent is that the provision thus invoked is patently inconsistent with the provisions of the standard form Government bill of lading, unquestionably the controlling document herein, and is necessarily excluded from the contract of carriage thereunder.

The primary problem, then, is one of documentary construction.[1] To reach the result for

[1] The petition for certiorari brought forward a contention that the judgment below was in conflict with the requirements placed upon carrier-shipper relationships by Sections 16 and 17 of the Shipping Act of 1916, 46 U. S. C. 815, 816. This point is not discussed in petitioner's brief on the merits, and we assume that it has been abandoned. The contention was, in any event, entirely without substance. That the Government is fully empowered to avail itself of privileges which may not be open to other shippers is evidenced by the compulsory use of the standard form Government bill of lading. The Maritime Commission, charged with the power and duty of exercising the regulatory authority under the Shipping Act, has never considered that the provisions of that statute are restrictive of relationships between carriers

which it contends, petitioner relies heavily upon assertions as to general commercial practice. Petitioner states that freight earned "lost or not lost" provisions, identical with the provision upon which its case rests, are now in general use in commercial bills of lading (Pet. 13–14), asserting that there is a "* * * well settled commercial practice that freight is earned on shipment * * *" (Pet. Br. 22); and that this "* * * well established or general practice * * * was incorporated into the terms of the carrier's bill of lading * * *" (Pet. Br. 23).

In addition to reliance on this asserted uniform commercial practice, petitioner, and carriers supporting it by briefs *amicus curiae,* also state that a consistent Government administrative practice of long standing supports their position. Petitioner urged, in the court below, that rulings of the Comptroller General fully sustained its views and that such rulings were entitled to substantial weight in interpretation of the contract involved (R. 48). The petition for certiorari and petitioner's brief both refer to rulings and letters of the Comptroller General, and his predecessors,

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and the Government as shipper. Finally, the terms and conditions involved in transportation of Government cargo do not fall within the area intended to be covered by the Shipping Act of 1916, namely, the control and regulation of practices between commercial shippers and carriers in the field of competition. It should also be noted that the Shipping Act of 1916 does not impose rate regulation on carriers in foreign commerce such as petitioner.

as evidencing a governmental recognition of an obligation to pay unearned freight upon receipt of Government cargo for shipment at port of origin (Pet. 21; Pet. Br. 16–19). Support of the carriers' position herein in a uniform Government practice is more boldly claimed in the briefs *amicus* filed in support of the petition for certiorari. The Waterman Steamship Company states that for "* * * many years the Government has considered that under documents such as here involved it was liable for freight even though the carrier was unable to deliver the cargo * * *" and that "* * * never before has the Government contended that it was on any different footing with respect to liability for freight than any private shipper * * *." (Waterman Steamship Corporation, Br. in support of petition as *amicus curiae*, 5.) The Stockard Steamship Corporation categorically asserts that the obligation to pay freight upon receipt of the goods by the carrier for shipment accords with the "long settled interpretation by the government of the applicable provisions of the bill of lading * * *" and that the Government's contention herein is a "sudden and belated reversal of position by the government * * *" (Stockard Steamship Corporation Br. in support of petition as *amicus curiae*, 4, 5). Drawing on these assertions as to uniform commercial practice and past governmental policy, it is made to appear that petitioner and other ocean carriers,

acting in good faith during the war, found themselves without protection as to the risk of loss of freight monies as a result of a sudden change in policy by the Government (Pet. 18–19; Pet. Br. 23; Stockard Br. *amicus*, 4).

No part of the picture thus created can survive close scrutiny. First, as we shall show in detail, there is no uniform commercial practice which would lead to the result for which petitioner here contends. The general maritime rule, that freight must be earned by delivery, remains intact and can only be avoided by the use of specific stipulations, designed by ocean carriers for that purpose. Many carriers use stipulations comparable to the provision upon which petitioner relies, making freight absolutely payable whether the payment is prepaid or collect at destination and whether or not any part of the transportation service has been performed. But an equally respectable number of carriers' bills of lading provide only for the retention of *prepaid* freight, whether vessel or goods be "lost or not lost," a provision which obviously could not qualify a carrier as plaintiff in this suit.[2]

Nor is there justification for the carriers' claim that they were surprised and left without protection by a sudden change in a previously consistent administrative practice. The accusation of un-

[2] Prepayment of freight is prohibited by the provisions of the standard form Government bill of lading and by R. S. 3648.

fairness leveled at the Government is based on an alleged reliance, apparently reached independently by all water carriers of Government cargo, on two isolated decisions, one in 1918 and the other in 1942, by the Government's accounting officers which fall far short of putting at rest the question here in issue.[3] No basis for the alleged reliance exists. For over a hundred years, the consistent administrative practice has been in full accord with the Government's position in this case. This Court may well notice that the shipment of Government property has been a distinct and well understood category of transportation since the beginning of the Republic; and that the terms and conditions which control such carriage, and the presentation and settlement of claims thereunder, form a familiar and continuous item in the business of every carrier. In fact, the absence of the asserted reliance is shown by the fact, noted by Judge Learned Hand in the court below (R. 41), that the petitioner made specific inquiry of the Comptroller General

[3] The decision of the Comptroller General of the Treasury upon which petitioner mainly relies, 24 Comp. Dec. 707, was issued in 1918. Even if this decision supported petitioner's position herein, it can hardly be viewed as controlling on the point here involved in the light of other decisions of the Comptroller General. Cf. Appendix B, separately printed. The second decision relied upon to illustrate a continuous administrative practice which misled petitioner is that found in 21 Comp. Gen. 909, an opinion rendered on April 7, 1942. It can hardly be assumed that this opinion was available to petitioner as a basis for action in connection with the ship-

on the point in issue, more than a year before the loss here involved occurred. The Comptroller's reply clearly put petitioner on notice that no such reliance as that here asserted was warranted. See Appendix B, p. 136.[4]

We submit that a construction of the pertinent language of the documents involved in this case, even without reference to the background of the phrasing employed, clearly shows that freight to destination is not earned by a carrier until the contract of carriage is performed by delivery of the shipment to destination. Reading the documents in the light of their background, there can be no doubt that the result reached by the court below was correct. Finally, we submit that the result below must be deemed compelled by the provisions of R. S. 3648.

I

THE STANDARD FORM GOVERNMENT BILL OF LADING PRECLUDES THE PAYMENT OF UNEARNED FREIGHT TO OCEAN CARRIERS

The issue of construction presented by this case centers on the reading of the standard form Government bill of lading together with peitioner's commercial bill of lading, in so far as it is incorporated therein by reference, as an

ment in this case. In point of fact, neither decision supports the position of the petitioners. See *infra*, pp. 17-18, 37-38.

[4] Appendix B hereto is printed under separate cover.

entire contract of carriage. Concededly, petitioner's commercial form bill of lading contains a provision which purports to entitle it to retain or recover freight, whether prepaid or collect at destination, although the transportation service is not performed. Essentially, petitioner's position is that this clause must be given full effect unless precisely contravened by some specific provision, designed to meet and offset it, in the standard form Government bill of lading. As the basis for this approach to the construction of the contract of carriage, petitioner asserts that there is a "* * * well established or general practice" that freight be deemed earned on shipment, vessel or goods lost or not lost, which has been uniformily embodied in the usual form commercial bill of lading (Pet. Br. 23). And see also Briefs as *amicus curiae,* Waterman Steamship Corporation, pp. 4, 5; Stockard Steamship Corporation, pp. 2, 3, 4, 5. In effect, petitioner seeks to raise the stipulation contained in its commercial form bill of lading to the dignity of a "legal rule" (Pet. Br. 19) and thus to throw on the Government the burden of showing an express agreement controverting this "legal rule." We submit that the approach suggested by petitioner is incorrect and without basis in general maritime law.

Unquestionably, the standard form Government bill of lading is the controlling document herein. All shipments of Government property

are required to be made subject to the provisions of the standard form bill which defines and limits the obligations of the Government under the contract of carriage.[5] For obvious consider-

[5] By General Regulations prescribed and published by the Comptroller General, and his predecessors, all shipments of Government property are made subject to the provisions of a set of standard forms. In part, this set comprises a bill of lading, memorandum bill of lading, shipping order, and voucher. See Treasury Department Circular No. 62, October 29, 1907, 14 Comp. Dec. 967; Treasury Department Circular No. 49, June 19, 1915, Digest of Comp. Dec. (1894–1920), p. 2489; General Regulations No. 69 of the Comptroller General, August 24, 1928, 8 Comp. Gen. 695; General Regulations No. 75 of the Comptroller General, June 26, 1931, 10 Comp. Gen. 581; General Regulations No. 97 of the Comptroller General, April 13, 1943, 22 Comp. Gen. 1172. The bill of lading set consists of the original bill of lading, containing the description of the articles comprising the shipment, evidence of delivery, and the terms and conditions of the contract of transportation, together with the memorandum copy or copies, to be retained for administrative purposes, and the shipping order, to be retained by the carrier. When the bill of lading forms have been completed by the consignor, the property listed therein consigned to the carrier for shipment, and the original bill receipted by the agent of the carrier, the consignor then transmits the original bill to the consignee, so that it may be in his possession upon arrival of the property and be promptly receipted and surrendered by him to the last carrier. When the shipping order has been otherwise completed, it is signed by the consignor and delivered to the initial carrier at the time the shipment is made and the bill of lading receipted by the initial carrier's agent. As provided in Condition 1 of the bill of lading, payment for transportation is made to the carrier upon the standard form voucher, accompanied by the bill of lading properly accomplished. If the bill of lading has been lost or destroyed, payment is made upon submission of a standard form Certificate in lieu of lost bill of lading.

ations of convenience, however, provision is made for the incorporation by reference into the Government form of such provisions of carriers' forms as are not inconsistent with the provisions of the Government form.[6] Cf. *M. K. T. R. R. Co.* v. *United States*, 62 C. Cls. 373, certiorari denied, 273 U. S. 725. Carriers' bills reflect and incorporate many details based on the needs of particular trades and voyages. The incorporation of these many and varied factors, embodied in clauses which reflect the physical operating experience of carriers, provides the Government with a ready method of rounding out the details of its contract of carriage. In addition, clauses protecting the carrier against cargo liability for marine peril, the restraint of princes, etc., are brought into the contract.

In sharp contrast to the incorporation of such features is the carrier's contention in this case as to the controlling nature of its commercial form clause. First, the one thing specifically covered within the four corners of the Government standard form bill is the subject of payment and the conditions on which payment will be made. These provisions do not relate merely to methods or time of payment. Examined specifically, the

[6] Condition 2 states: "Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments on the usual forms provided therefor by the carrier" (R. 72B).

Government standard form bill makes it perfectly plain that payment is completely conditioned on proof of performance. Any provision in a carrier's commercial form bill of lading which would vary the basic consideration on which payment will be made by the Government is necessarily inconsistent with the standard form bill, the basic document in the contract of carriage. (See Point I–B, *infra*, pp. 24–31.)

Secondly, petitioner's allegations concerning general maritime law and the incidence in commercial bills of lading of the freight clause employed in petitioner's bill are completely erroneous and misleading and afford no basis for construing the contract of carriage as including petitioner's freight clause. Since petitioner's case is bottomed upon these erroneous allegations as to general maritime law and usage, it is necessary, prior to a detailed examination of the contract, to state correctly the general maritime law which would be applicable in the absence of express agreement between the parties.

A. THE GENERAL MARITIME RULE, THAT FREIGHT MUST BE EARNED BY PERFORMANCE, CONTROLS THE SHIPPER'S OBLIGATION TO PAY FREIGHT UNLESS AVOIDED BY EXPRESS STIPULATION

In both England and this country, it has long been well settled that, absent agreement to the contrary, the carrier does not earn and may not claim payment of freight until it has delivered the

goods to destination.[7] *Brittan* v. *Barnaby*, 21 How. 527, 533; *Caze & Richaud* v. *Baltimore Ins. Co.*, 7 Cranch 358; *The Cuba*, 6 Fed. Cas. No. 3458 (D. Me.); *Dakin* v. *Oxley* [1864], 33 L. J., C. P. 115, 119; *Asfar & Co.* v. *Blundell* [1896], 1 Q. B. 123; Angell, *Carriers*, § 399 (5th ed. 1877); Scrutton, *Charter Parties*, Art. 139 (15th ed. 1948); Robinson, *Admiralty*, § 82 (1939). "Nor," as the court below observes, "is this result unjust to, or

[7] Of course, the rule has always been that freight is earned if the carrier is ready to deliver but the consignee is unable or unwilling to receive. In *The Nathaniel Hooper*, 17 Fed. Cas. 1185, 1190 (C. C. D. Mass.), 3 Sumn. 542, 555, the Court said: "The whole of the cases, in which the full freight is upon the ordinary principles of commercial law due, notwithstanding the non-arrival of the goods at the port of destination, may be reduced to the single statement, that the non-arrival has been occasioned by no default or inability of the carrier ship, but has been occasioned by the default or waiver of the merchant-shipper." See *Clendaniel* v. *Tuckerman*, 17 Barb. (N. Y.) 184, where carrier was ready to deliver cargo but consignee was not ready to receive it and while waiting to discharge cargo the vessel was capsized by a freshet and the cargo lost. *Held*, freight earned. See *Cargo ex Argos* [1873], L. R. 5 P. C. 134; Poor, *Charter Parties and Ocean Bills of Lading*, § 108 (3d ed. 1948).

The Comptroller General's decision of 1942, 21 Comp. Gen. 909, upon which the petitioner relies (Pet. Br. 17), is consistent with this principle, but it is certainly no authority for the proposition that the Government, as a shipper, is liable for freight on cargo which the carrier was never ready to deliver. The narrow decision in that opinion was that substitute evidence could be furnished by a carrier to show that the contract of carriage had been completed to port of desti-

hard upon, the petitioner [carrier]. The law throws upon all carriers the risk of performance, for performance is a condition upon the shipper's promise to pay, just as performance is always a condition upon payment in any contract of service." (R. 42.) In *The Ann D. Richardson*, 1 Fed. Cas. No. 410 (S. D. N. Y.), the court stated the basis for the general rule (p. 953): "The delivery of the cargo at the port of destination is considered a condition precedent to the right to freight * * *." See *The Norman Prince*,

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nation but that conditions at that point prevented the carrier from obtaining the necessary receipts upon delivery. In so far as the issue here is concerned, we submit that the Comptroller General's decision of 1942 fully supports the Government's position. That decision expressly adhered to the general rule that "delivery of the cargo at the port of destination is a condition precedent to the right to freight" (p. 912), but held (p. 913) that "the difficulty here is not that these particular shipments were not transported to destination but rather that due to conditions of war prevailing in the Philippine Islands and Guam, it is not possible to establish of record that said shipments were received by the consignee from the carrier at destination. In view of the known conditions in said islands, as commonly reported in public dispatches, any failure to transfer the goods to, or to take receipt from, the consignee upon the discharge of cargo at destination at any time since the early part of December 1941, reasonably may be assumed to be due to the inability of the consignee to receive rather than to any failure of the carrier to deliver, and so would not defeat the right of the carrier to freight charges." The decision thus contemplates merely excusing the carrier from obtaining the certificate and not from carrying the goods to destination. Cf. *McClure* v. *United States*, 19 C. Cls. 173, 181.

185 Fed. 169, 171 (S. D. Ala.). This general rule of the law merchant may be varied by express agreement, sufficiently clear as to leave no doubt with regard to the intention of the parties in framing the contract of affreightment. *Brittan* v. *Barnaby*, 21 How. at 536; *Christie* v. *Davis Coal & Coke Co.*, 95 Fed. 835, 839 (S. D. N. Y.); *The Norman Prince*, *supra*; *London Transport Co.* v. *Trechmann Brothers* [1904], 1 K. B. 635; Angell, *Carriers*, § 399, note (a); *Benner* v. *Equitable Safety Ins. Co.*, 6 Allen (Mass.) 222, 224; *Norton-Crossing Co.* v. *Martin*, 202 Ala. 569, 81 So. 71. Where such an express agreement is made, it does not work any change in the basic concept as to the earning of freight. Freight, strictly speaking, can only be payment for the conveyance of cargo to destination. *Poland* v. *The Spartan*, 19 Fed. Cas. No. 11246 (D. Me.); see *Brittan* v. *Barnaby*, 21 How. 527, 533; Smith, *Mercantile Law*, p. 391 (3d ed. 1855); Angell, *Carriers*, § 399 (5th ed. 1877). Carriers' stipulations in avoidance of the general rule are enforced only as bargains between the parties and without relation to performance of the transportation service. *Portland Flouring Mills Co.* v. *British & Foreign Marine Ins. Co.*, 130 Fed. 860, 864 (C. A. 9), certiorari denied, 195 U. S. 629; *The Queensmore*, 53 Fed. 1022 (C. A. 4); *James Richardson & Sons*

v. *158,200 Bushels of Wheat*, 90 F. 2d 607 (C. A. 2).[8]

The current vitality of this basic rule is demonstrated by a recent decision of the Court of Appeals for the Second Circuit which held that, in the absence of an express stipulation, a carrier could lay no claim to freight when it had not performed the contract of carriage. *The Motomar*, 108 F. 2d 755 (C. A. 2), affirming 29 F. Supp. 210 (S. D. N. Y.). Thus, contrary to petitioner's insinuations, the widespread use of such stipulations has effected no change in the underlying law.

In point of fact, carriers' stipulations concerning the obligation to pay freight when cargo is not delivered do not display the uniformity which petitioner assumes. Such stipulations may be

[8] In *The Gracie D. Chambers*, 253 Fed. 182, 184 (C. A. 2), the court said:

> The District Judge thought that if the ship had broken ground—e. g., if she had sailed a mile—the prepaid freight [with a "ship lost or not lost" provision] might be retained. Clearly it could not be retained for that reason, because under our law it is not earned until delivery of the cargo. Only the clause in the bill of lading could authorize the retention.

This was specifically affirmed by this Court at 248 U. S. 387, 392. It and *Allanwilde Transport Corp.* v. *Vacuum Oil Co.*, 248 U. S. 377, stand for the proposition that agreements as to retention of freight contrary to the general rule will be enforced, even though in actuality the freight has not been earned. See *Benner* v. *Equitable Safety Ins. Co.*, 6 Allen (Mass.) 222, 224.

divided into two main types.[9] The first type, and by far the older, guarantees to an ocean carrier the right to retain *prepaid* freight, vessel or goods lost or not lost.[9] It is this type of unearned freight stipulation which has received the greatest amount of judicial scrutiny. See, *e. g.*, *Allanwilde Transport Corp.* v. *Vacuum Oil Co.*, 248 U. S. 377; *International Paper Co.* v. *The Gracie D. Chambers*, 248 U. S. 387; *Standard Varnish Works* v. *The Bris*, 248 U. S. 392.[10] The second type, comparable to that of the petitioner's bill of lading, gives to the carrier an absolute right to freight at some point at the outset of the venture, whether freight be prepaid or

[9] Historically, the length and difficulty of voyages, the lack of a carrier's agent at port of destination, and other comparable factors, gave rise to a practice among carriers of bargaining with shippers for prepaid freight. By English law, such prepaid freight could not be recovered by the shipper where the ship, through no fault on its own part, had been prevented from completing the voyage (*Byrne* v. *Schiller*, [1871] L. R., 6 Ex. 319; *Allison* v. *Bristow Marine Ins. Co.*, [1876] 1 App. Cas. 209), a rule apparently intended as an inducement to shipowners to undertake the perilous run to India. See Robinson, *Admiralty*, § 82 (1939). The American rule is squarely to the contrary. Prepaid freight, in the absence of special agreement, is required to be refunded to the shipper if the goods were not carried and delivered. *The Kimball*, 3 Wall. 37, 44; *Griggs* v. *Austin*, 3 Pick. (Mass.) 20; *De Sola* v. *Pomares*, 119 Fed. 373 (S. D. N. Y.); Poor, *Charter Parties and Ocean Bills of Lading*, § 109 (3d ed. 1948).

[10] In all of these cases, the question certified to this Court by the Court of Appeals for the Second Circuit related only to the carrier's right to retain or recover prepaid freight.

collect at destination. Petitioner insists, without mention of the above described variations, that the clause contained in its bill of lading represents a long established and uniform practice among ocean carriers. Such has not been and is not the case. An examination of certified bills of lading on file with the Division of Regulation, United States Maritime Commission, reveals that a large number of ocean carriers still limit their unearned freight clause to the prepaid freight situation; and that a number of the carriers' bills of lading, which are now like the petitioner's, were amended in 1936 and later to remove the limitation.[11] In view of the obvious need for uniformity in determining the nature of the basic service (*i. e.*, whether delivery of cargo at destination or mere acceptance of cargo at port of origin) for which the Government's standard form bill of lading is intended to obligate the Government to pay, this variation in commercial practice seriously weakens the petitioner's contention that the Government's standard form is intended to incorporate by reference

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[11] See Appendix A, *infra*, pp. [illegible]. The certified bills of lading examined include those contemporary with that used by petitioner. Significantly, a member of petitioner's own shipping conference of three carriers (Leeward & Windward Islands Conference), the Bermuda & West Indies Steamship Co., Ltd. (R. 60), employed, at the time in question, only the prepaid freight clause. (The Bermuda & West Indies Steamship Co. is listed in Appendix A as Furness West Indies Line.)

the carrier's unearned freight clause, whatever it may be.[12] And see *infra*, pp. 34–35.

B. THE STANDARD FORM BILL OF LADING SPECIFICALLY CONDITIONED PETITIONER'S RIGHT TO FREIGHT UPON DELIVERY OF THE CARGO TO DESTINATION

1. From the foregoing paragraphs, it is apparent that the Government cannot be liable for freight in the instant situation unless it has expressly so stipulated. But no such stipulation can be read into the Government's standard form bill of lading, which embodies the agree-

[12] Moreover, even if the petitioner's assertions as to uniform practice among ocean carriers were more accurate than they are, and if this "uniform practice" could be supposed to have changed the established rule of admiralty, it would still be necessary to point out that generalizations based on commercial practice are not always helpful where the construction of government forms is concerned. The situation of the Government differs in a number of significant respects from that of private commercial shippers. Thus, as Judge Learned Hand pointed out in the court below (R. 43), a probable reason for the prevalence of the clause which reverses the rule of admiralty and throws the risk upon the shipper is simply the carrier's superior bargaining position. But, *vis a vis* the Government, the carriers could normally exercise no such compulsion, for the bargaining position of the Government is obviously much stronger than that of any private shipper. Again, Judge Hand pointed out, the commercial shippers may accept the carriers' terms because, in their case, the burden is distributed by insurance; but the United States must be a self-insurer in the absence of express statutory authority. In short, the considerations upon which the petitioner predicates its implication that the rule of *Brittan* v. *Barnaby*, 21 How. 527, *supra*, is no longer law, have but little application to situations in which the Government is the shipper.

ment between the parties. That the Government bill of lading, on the contrary, constitutes a "carefully devised plan" whereby payment of freight is conditioned on performance of the contract of carriage and the submission of proof of such performance as pointed out by the court below (R. 42) is clearly established by the steps which it requires the carrier to take in order to obtain payment. Condition 1 of the Government standard form provides (R. 72B):

> Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier unless otherwise specifically stipulated.

Thus, payment is made by the Government, not through its agents or employees acting as shippers or consignees, but only through the usual channels by which all payments for services to the Government are made, designated disbursing officers. Payment by such officers is conditioned on the presentation of a bill of lading, "properly accomplished," together with a freight voucher on the authorized form.[13] Until

[13] Since payment of Government freight is conditioned on the presentation of a properly executed standard form freight voucher as well as an accomplished bill of lading,

such presentation, no obligation to pay can arise. This condition precedent is evidenced by the carefully integrated provisions of both standard forms.[14]

Instruction 2 of the Government standard form bill of lading (R. 72B) provides that—

> * * * The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading

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there is obviously no merit to petitioner's suggestion that the terms on which the Government agrees to pay freight should be decided without reference to the freight voucher (Pet. Br. 25). This Court might well take notice that such freight vouchers are fully as familiar to carriers as is the standard form Government bill of lading and that carriers contract with reference to the execution of all documents necessary to receive payment for the performance of transportation service, particularly since they are specifically notified at the outset, by Condition 1 of the standard form bill of lading, that the freight voucher forms a necessary ingredient in the proof upon which payment will be based.

[14] In its brief *amicus curiae* (p. 7), the Waterman Steamship Corporation asserts that the only pertinent clauses of the standard form bill are those labeled "Conditions" and that clauses labeled "Instructions" and "Administrative Directions" form no part of the contract of carriage. Waterman thereby overlooks Condition 2 of the standard form which incorporates into the contract the provisions of the carrier's usual bill "unless otherwise specifically provided or otherwise stated hereon." The plain import of that condition is to make all the language contained on the reverse of the standard form a part of the contract of carriage. Unless it be thought that Condition 2 is redundant in employing the phraseology "otherwise provided or otherwise stated," it is clear that reference is had by "otherwise provided" to the Conditions and by "otherwise stated" to the Instructions and Administrative Directions.

> and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. * * *

The certification required of the consignee for the "proper accomplishment" of the bill of lading is entitled "Certificate of Delivery" (R. 72A) and certifies that—

> I have this day received from (name of transportation company) at (actual point of delivery by carrier) the public property described in this bill of lading, in apparent good order and condition, except as noted on the reverse hereof.

In accordance with Condition 1, the "properly accomplished" bill of lading, when presented for payment, must be accompanied by the prescribed standard form Government freight voucher. This voucher provides (R. 74B):

> 6. Payment for transportation charge will be made only for the quantity of stores delivered at destination * * *.

These instructions demonstrate that there is no ambiguity as to what is meant by "properly accomplished"; [15] the consignee is not authorized to

[15] Petitioner's reference (Pet. Br. 13–14) to the meaning of the word "accomplished," in connection with bills of lading in common maritime usage, is without relevance here. The problem here is whether the standard form bill of lading has been "properly" accomplished. "Proper" accomplishment can only result from satisfaction of the various steps and conditions required in the standard form documents set out above.

endorse and surrender the bill of lading without receiving the goods. Only a bill so receipted [16] is a "properly accomplished" bill of lading, the only kind on which the paying officer may pay freight—and then "only for the quantity of stores delivered at destination." We submit that it is completely clear, from the procedure specifically set out in the standard form Government bill of lading and freight voucher, that the Government undertakes to pay freight only for completed transportation service and that the Government standard contract for such service specifically so provides.

Bearing out and strengthening this interpretation are the provisions of Instructions 4 and 5 of the standard form bill, relating to lost or destroyed bills of lading. Instruction 4 (R. 72B) states that—

> * * * In case the bill of lading has been lost or destroyed, the carrier shall be furnished by the consignee with a "Certificate in lieu of lost bill of lading," on the standard form prescribed therefor [Standard Form No. 1061, August 24, 1928, 8 Comp. Gen. 703] which, when finally consummated by acknowledgment

[16] Herein the consignee's Certificate of Delivery was merely endorsed "S. S. GUNVOR has been lost due to enemy action" "For the Acting District Engineer [signature illegible] Superintendent, August 8, 1942" (Ex. 11; R. 72A). Such an endorsement is intended for the subsequent use, as in this case, of the disbursing and accounting officers of the Government (R. 65).

> of the "Certificate and waiver by transportation company," shall accompany the bill for services submitted by the carrier * * *.

Like the standard form bill of lading, the Certificate in lieu of lost bill of lading bears on its face a Certificate of Consignee which must be "properly accomplished" prior to presentation with the standard form voucher for payment (Condition 1 of Standard Form No. 1061). Proper accomplishment is had when the consignee affirms that (8 Comp. Gen. 703)—

> I hereby certify to the receipt of the above-described property, except as noted on the reverse hereof, and that the original bill of lading indicated has not been received, nor can it be located.

The procedure to be followed in the event of a lost bill of lading is further amplified in Instruction 5 of the standard form bill (R. 72B), which provides that—

> To insure prompt delivery of property, in the absence of a bill of lading, the consignee should give to the carrier a "Temporary Receipt," executed on the prescribed form [Standard Form No. 1060, August 24, 1928, 8 Comp. Gen. 703] *for the property actually delivered.* On the recovery of the bill of lading, or when the certificate provided for above shall have been given, a statement will be indorsed on said bill of lading or certificate of the fact of the

> delivery *as per said temporary receipt* * * * and both papers attached and forwarded with the claim for payment thereon. [Emphasis added.]

The duties of the consignee and the rights of the carrier are thus plainly defined. As in the case where the bill of lading is not lost or destroyed, the consignee is to acknowledge receipt only of the goods actually received. When so receipted and attached to the standard form voucher, payment is then made "only for the quantity of stores delivered at destination."

Thus, each and every provision of the standard forms specifically conditions the right to freight upon delivery of the cargo to destination. In other words, the Government undertakes to pay freight only for cargo actually delivered to destination. Where, as here, no cargo is thus delivered, no obligation to pay freight arises. The complete interdependence between performance of service and obligation to pay is further demonstrated by those provisions of the standard form bill which define the Government's obligation to pay freight on cargo which is partially lost or delivered in a damaged condition. In cases of short delivery, freight is paid only up to the extent of the transportation service rendered. 4 Comp. Gen. 562; 3 Comp. Dec. 221; 4 Comp. Dec. 544. Instruction 6 of the standard form bill of lading provides (R. 72B):

> In case of loss or damage to property while in the possession of the carrier, such loss or damage shall, when practicable, be noted on the bill of lading or certificate in lieu thereof, as the case may be, before its accomplishment. All practicable steps shall be taken at that time to determine the loss or damage and the liability therefor and to collect and transmit to the proper officer, without delay, all evidence as to the same. Should the loss or damage not be discovered until after the bill of lading or certificate has been accomplished, the proper officer shall be notified as soon as the loss or damage is discovered, and the agent of the carrier advised immediately of such loss or damage extending privilege of examination of shipment."[17]

The prescribed report of loss, damage or shrink-

[17] Instruction 6 is but a lost or damaged deficiency provision, and serves a two-fold purpose. It is inserted with a view to the established right of the shipper to deduct from the freight charges damage to the cargo due to the negligence of the carrier. See *The Water Witch*, 1 Black 494; *The Rita Sister*, 69 F. Supp. 480 (E. D. Pa.); *Clifford* v. *Merritt-Chapman & Scott Corp.*, 57 F. 2d 1021, 1024 (C. A. 5). Secondly, it recognizes and incorporates the doctrine of part payment whereby, in spite of the fact that a portion of the cargo has been lost, the carrier is entitled to freight on the goods actually delivered. See *Edward Hines Lumber Co.* v. *Chamberlain*, 118 Fed. 716 (C. A. 7); *Gibson* v. *Brown*, 44 Fed. 98 (S. D. N. Y.); *Price* v. *Hartshorn*, 44 N. Y. 94. Clearly such a provision does not envisage payment of full freight in spite of partial delivery but "shows that freight was to be allowed on that which was received." *Price* v. *Hartshorn*, *supra*, at 101.

age set forth on the reverse of the standard form bill of lading (R. 72B), notifies the carrier that the "shipment was received in condition shown below and that claim is made for the value of such loss, damage, or shrinkage, as indicated." After accomplishment, the standard form bill is attached to the standard form voucher which declares that (R. 74B)—

> 6. Payment for transportation charge will be made only for the quantity of stores delivered at destination, * * *. Loss or damage for which a carrier is responsible will be deducted in making settlements for the services.

The standard form bill and voucher, thus read together, plainly embody the Government policy that freight will be paid only for transportation services actually rendered.[18]

[18] The dissenting opinion below of Judge Augustus Hand, in holding that Condition 1 and Instruction 2 of the standard form bill are not inconsistent with the provision of Article 6 of the petitioner's commercial form bill of lading that freight shall be due even though cargo be lost, is grounded mainly upon an erroneous reading of Instruction 6. The opinion states "Nor do I see that the provisions of Condition 1 or Instruction 2 control the case at bar. * * * Condition 1 and Instruction 2 relate only to the mode of settlement when the freight has been delivered. Instruction 6 apparently deals with a case where there has been partial delivery, and seems to involve the assumption that there may be instances where there is a partial loss for which freight charges may be collected under the terms of the commercial bill of lading. Instruction 6 does no more than require a notation of such a partial loss on the government bill of lading and contains nothing to indicate that such partial loss would prevent the

Under the terms of the Government's standard form (Condition 2) the provisions of a carrier's commercial form are applicable only in so far as not "otherwise specifically provided or otherwise stated" in the Government form. The foregoing paragraphs make it plain that Article 6 of the petitioner's commercial form provision entitling it to freight even though it has lost the cargo which was to be delivered, cannot be reconciled with the "carefully devised plan" of the Government form of contract and so cannot form a part of that contract. As we have demonstrated, the above described provisions of the Government bill of lading specifically exclude the incorporation of any provision that freight might be earned other than by performance of the transportation service.

Moreover, we believe that the first sentence of Condition 1 of the standard form Government bill in itself specifically prohibits the applicability of petitioner's Article 6, particularly if the provision in petitioner's bill be read with the same literalness which petitioner advocates in connection with the Government standard form.[19]

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bill of lading from being 'properly accomplished.'" (R. 44.) Since the standard form voucher specifically provides, in accordance with long established Government practice, that a proportional reduction of freight is made for short delivery, it is apparent that Judge Hand's assumption as to the meaning of Instruction 6 is incorrect.

[19] A close reading of petitioner's Article 6 is warranted by the rules in decided cases, *supra*, p. 19., that stipulations in

Since 1915, Condition 1 of the Government standard form has specifically prohibited both prepayment and payment by consignee at destination. Article 6 of petitioner's commercial form, making freight due and payable though unearned, applies in terms only to shipments on which freight is either prepaid or payable by consignee at destination. No provision is made therein for any other type of shipment.[20]

Since there can be no payment of freight on Government shipments either at point of origin or by the consignee, petitioner's stipulation as to unearned freight fails to avoid its general maritime law obligation in connection with Government cargo.

2. The inappropriateness of the language of petitioner's Article 6 in connection with Government shipments evidences its basic inappositeness for use in connection with Government form con-

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avoidance of the shipowner's obligation to perform in order to earn freight, must be precise to be given effect.

[20] Article 6 provides in pertinent part that—

> Full freight to destination, whether intended to be prepaid or collected at destination, * * * are due and payable * * * as soon as the Goods are received for purposes of transportation; and the same * * * shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading, of the service hereunder without deduction (if unpaid) or refund in whole or in part (if paid). Goods or Vessel lost or not lost, or if the voyage be broken up; * * * and the Carrier shall have a lien on the Goods therefor * * * . Full freight shall be payable on damaged and unsound goods. * * * (R. 69–70.)

tracts of carriage.[21] Petitioner's unearned freight clause arose from and is designed to meet the relationship between commercial shippers and carriers. And the justification which petitioner offers in support of the clause consists entirely of economic considerations which have little or no application to the Government (Pet. Br. 25). And see fn. 12, *supra*, p. 28. On the other hand, it is clear that, if there is any matter on which a standard form Government bill of lading ought to receive uniform interpretation, it is on the nature of the service which a carrier must perform in order to qualify for payment. At the present time, petitioner's contention, that the Government is obligated to pay for a service not performed by virtue of its unearned freight clause, would result in complete lack of uniformity. Carriers performing services for the Government comparable to that of petitioner, who employ only the "prepaid" form of unearned freight clause, would entirely lack standing as claimants for unearned freight, since freight on

[21] Apparently recognizing the conflict between the Government standard form and the commercial form bill of lading with regard to the issue herein, Waterman goes so far as to suggest that the Government form is a mere "makeshift" and the Government in reality has no proper form for ocean transportation, *i. e.*, one which would give adequate recognition to carriers' peculiar customs including, of course, the right to unearned freight (Waterman, brief *amicus*, 8). Waterman does admit that the Government standard form is and always has been required for ocean shipments of Government cargo (Waterman, brief *amicus*, 4).

Government shipments can never be prepaid. As we have shown above, there are a respectable number of such carriers. Moreover, if petitioner's contention be accepted, it would logically follow that the nature of the Government's obligation to pay could be varied, at will, by the carriers. We submit that it cannot be supposed that the standard form Government bill of lading was intended to leave the most basic question of the contract of carriage, the nature of the service for which payment was to be made, to the incorporation by reference into the standard form of an easily changeable provision in carriers' commercial form bills of lading.

3. Petitioner, and carriers supporting it by briefs *amicus curiae,* assert that a consistent Government administrative practice of long standing supports their position. Petitioner urged, in the court below, that Comptroller General rulings fully sustained its views and that such rulings were entitled to substantial weight in the interpretation of the contract of carriage (R. 48). The petition for certiorari and the petitioner's brief both refer to rulings and letters of the Comptroller General, and his predecessors, as evidencing a governmental recognition of an obligation to pay unearned freight upon receipt of Government cargo for shipment at point of origin (Pet. 21; Pet. Br. 16–19). The Waterman Steamship Company states that for "* * * many years the Government has considered that under

documents such as here involved it was liable for freight even though the carrier was unable to deliver the cargo * * *" and that "* * * never before has the Government contended that it was on any different footing with respect to liability for freight than any private shipper * * *." Waterman Steamship Corporation, Br. in support of Petition as *amicus curiae,* 5. Similar statements are made in the brief as *amicus curiae,* p. 4. The Stockard Steamship Corporation categorically asserts that the obligation to pay freight upon receipt of the goods by the carrier for shipment accords with the "* * * long-settled interpretation by the government of the applicable provisions of the bill of lading," that "The government thus adopted and acted upon over a period of many years an interpretation directly opposed to that for which it now contends," and that accordingly "The harsh results to the steamship companies when they contracted in reliance on the accepted interpretation impose on the government a heavy burden of proof to justify its sudden and belated reversal of position." Stockard Steamship Corporation, Brief as *amicus curiae,* 3, 4.

These statements are simply untrue. At our request, the Comptroller General's office has made as careful a study as was possible in the time available. A report on that study with supporting references and attachments is attached hereto

as Appendix B.[22] Such report, a fair and careful statement with regard to interpretation and application of the Government standard form bill of lading in relation to the issue here raised, demonstrates a consistent administrative practice in support of the position which the Government urges herein. Moreover, the report demonstrates that there is no basis whatsoever for the contention by petitioner and its sup-

[22] Particular mention should be made here of the decision of the Comptroller of the Treasury reported in 24 Comp. Dec. 707. The heavy reliance which petitioner, and the carriers supporting petitioner, place upon the opinion is in no way justified. The contract of carriage there involved was not the Government standard form contract. The Government form bills of lading which covered the freight charges there involved had been changed so as to relieve the carrier of any responsibility for condition or contents of cargo on delivery and further specifically provided that freight was to be prepaid. Stamped on the Government form was "Not responsible for condition or contents on delivery" and "freight prepaid." The special contract thus formed was controlling as to the intent of the parties. Cf. *Toyo Kisen Kaisha* v. *W. R. Grace & Co.*, 53 F. 2d 740 (C. A. 9), certiorari denied, 276 U. S. 717.

This deviation from the Government's normal practice may be accounted for by the fact that the carriage concerned in 24 Comp. Dec. 707 was performed by a vessel operated for the United States Shipping Board Emergency Fleet Corporation. While, in 1918, caution was exercised in dealing with certain aspects of the function of the corporate entity created by the Government to handle World War I shipping, there is no doubt that the Fleet Corporation was a governmental agency. Compare *United States ex rel. Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, with *Emergency Fleet Corp.* v. *Western Union*, 275 U. S. 415. Accordingly, the opinion in 24 Comp. Dec. 707 was concerned with freight

porters herein that they were caught by surprise and unprotected by a sudden change in the Government's policy and position. On the contrary, the report indicates, what might have been expected, the carriers' complete familiarity with the terms and conditions of Government transportation under standard form bills and a more or less continuous effort to work a change in the Government's position.

II

R. S. 3648 CLEARLY PROHIBITS THE PAYMENT OF UNEARNED FREIGHT BY THE GOVERNMENT

As a simple matter of contract interpretation, petitioner's claim fails. In addition, and apart from the question of contractual intent,[23] it is

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earnings by the Government as a carrier, and interdepartmental accounting. Similarly, in World War II, the Government became, of necessity, the principal carrier. In connection with this function, the Comptroller General authorized, in May 1944, the use by the War Shipping Administration of a special form of bill of lading, the "War Shiplading," for use by the Government in the transportation of its own property. Payment to the War Shipping Administration by other Government departments under the "War Shiplading" was again merely a matter of intergovernmental accounting. Petitioner's unexplained quotations (Pet. Br. 18) from the Comptroller General's authorization of May 11, 1944, to the War Shipping Administration, are taken out of context and are misleading. See Appendix B, p. 185.

[23] We do not mean to infer that the standard form Government bill of lading does not reflect the legislative mandate of R. S. 3648. Recognition of this appears throughout the rulings of the Government's officers. See Appendix B, pp. 7, 9, 11, 13–14, 18, 26–28.

plain that petitioner's claim in this suit is barred by R. S. 3648, *supra*, p. 2. R. S. 3648 provides that "* * * no advance of public money shall be made in any case * * *" unless otherwise permitted by law and that "* * * in all cases of contracts for the performance of any service * * * payment shall not exceed the value of the service rendered * * *." This statute, enacted by Congress in 1823, is in full force and effect today and furnishes a basic control over the expenditure of public monies.[24] This Court has long recognized that R. S. 3648 prohibits the expenditure of public monies before the actual performance of the service, a prohibition which also forbids Government officers to contract for such payment. *The Floyd Acceptances*, 7 Wall. 666, 683; 10 Op. A. G. 288, 301. The statutory touchstone is not benefit to the Government but completion of the performance of the service for

[24] Specific statutory authority is required to avoid the prohibition of R. S. 3648. See annotations (cross references) in 31 U. S. C. A. 529. The need for such superseding statutory authority was forcefully illustrated during World War II, as to the point here in issue, by the issuance of Circular No. 7 by the Chief of Transportation, War Department, January 22, 1943, directing transportation officers, pursuant to authority contained in Executive Order 9001, 3 C. F. R. Cum. Supp. 1054, to place on Government bills of lading, covering shipments on vessels of foreign registry, a notation reciting "ocean freight charges hereon stated are now due and payable, cargo being aboard vessel for shipment to consignee" and making reference to Executive Order 9001. Appendix B, pp. 25, 203. Said Executive order was issued pursuant to authority of the First War Powers Act, 55 Stat. 839.

which the Government contracted. *McClure* v. *United States*, 19 C. Cls. 173, 181; 21 Comp. Gen. 909.[25]

In other words, no Government officer has power to enter a contract with petitioner which would sanction payment for a service not rendered.[26] Recognizing the limitation on its contract of carriage, petitioner asserts that payment of full freight to destination would not "* * * exceed the value of the service contracted for: * * *" (Pet. Br. 26; see also Waterman Steamship Corporation, Br. as *amicus curiae*, 15). The Government contends that it can be obliged to pay full freight to destination only where Government cargo is carried to destination, and that any other view of its obligation is in violation of R. S. 3648. *M. K. T. R. R. Co.* v. *United States*, 62 C. Cls. 373, 376–378, certiorari denied, 273 U. S. 725.[27]

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[25] The brief *amicus* filed by Waterman Steamship Corporation completely misapprehends the Government's position on this point (brief as *amicus curiae*, 13–15).

[26] In *The Floyd Acceptances*, *supra*, at 682, this Court specifically noted "* * * the limitations which it [R. S. 3648] imposes upon all officers of the government." The United States can neither be bound nor estopped by unauthorized contracts entered into by its agents or employees. *Wilbur National Bank* v. *United States*, 294 U. S. 120, 123–124; *Utah Power & L. Co.* v. *United States*, 243 U. S. 389, 408–409; *Yuma Water Ass'n.* v. *Schlecht*, 262 U. S. 138, 144; *United States* v. *San Francisco*, 310 U. S. 16, 31–32.

[27] The *M. K. T.* case involved a claim by the carrier that a limitation provision contained in its ordinary commercial bill of lading was incorporated by reference into the Gov-

In insisting that full freight to destination is the value of the service contracted for and that such freight is earned by the carrier on receipt of the goods for shipment, the carriers herein pervert the underlying general maritime law. As we have shown, *supra*, pp. 17–20, freight can only be payment for the conveyance of cargo to destination. Although carriers may stipulate that "freight" may be retained or recovered though cargo is not delivered to destination, such payment is not strictly speaking, "freight." This Court, and lower federal courts, have specifically recognized that carriers do not earn "freight" upon receipt of the cargo for shipment. Such stipulations are valid and enforceable, not because the contract of service has been performed, but because the shipper has bargained away its right to insist upon complete performance. Whatever the consideration may be for such bargain, it is not performance. Although such consideration may constitute "value" sufficient, as a matter of contract law, to uphold such a stipulation between commercial shippers and carriers, it is clearly not the "value of the service

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ernment standard form bill and that the Government claim against it was therefore barred. It should be noted that the shipment involved was under the 1915 standard form bill which did not contain the specific provision (Instruction 7) as to periods of limitation on claims against carriers which appears in the form here involved.

rendered" to the Government which is contemplated by R. S. 3648.

At bottom, petitioner's whole case rests upon a plea that this Court read into the blunt protective language employed by Congress in 1823, and never thereafter varied, elusive notions of consideration developed long after the enactment of R. S. 3648. Neither in the field of ocean transportation nor in other fields in which the Government contracts, can the meaning of "value of the service rendered" be satisfied by an artificial stipulation which would permit the expenditure of public money for something other than performance. The Government's needs and policy are uniform in all fields, and no basis exists for placing ocean carriers in a preferred status. It is inconceivable that the Government could be absolutely obligated, by a stipulation, to pay the full price for a battleship or a building upon the laying of the keel or the digging of the foundation, regardless of the subsequent inability, without regard to fault, of the contractor to complete performance.[28]

[28] Finality of obligation on the part of the Government is the essence of petitioner's contentions. Opinions of the Attorney General referred to by Waterman Steamship Corporation as *amicus curiae* (Br. 15), are irrelevant on this score: In neither opinion is it indicated that the Government could be compelled, by contract, to pay for a service not rendered. Cf. 20 Op. A. G. 746.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment below should be affirmed.

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NOVEMBER, 1949.

APPENDIX A

By order of December 6, 1935, the Secretary of Commerce directed all water carriers engaged in the foreign commerce of the United States, who desired to obtain the protection of Clause 14 of Part II of the uniform through export bill of lading form prescribed by the Interstate Commerce Commission, to file with the Division of Regulation of the United States Shipping Board Bureau of the Department of Commerce certified copies of port bill of lading forms used in connection with the uniform through export bill of lading. The order provided that such file shall be subject to inspection at all reasonable times by any person upon request. The following tabulation of freight clauses of export bills of lading used by water carriers is based on that file, now maintained by the Division of Regulation of the United States Maritime Commission. In general, water carriers utilize one of two standard form freight clauses. That most commonly employed states that full freight, whether stated or intended to be prepaid or collected at destination, is deemed earned on receipt of the goods by the carrier, vessel or goods lost or not lost (column 2). The alternate form provides merely that prepaid freight (or freight stated or intended to be prepaid) is deemed earned on receipt of the goods by the carrier, vessel or goods lost or not lost (column 3). Where a carrier has employed both freight

clauses, the symbol "X" denotes the form currently filed with the Division of Regulation of the Maritime Commission and the date of the superseded form is given in the adjoining column.

Carrier	Collect and prepaid freight	Prepaid freight
Alcoa Steamship Company	X	
Aluminum Line (Alcoa SS Co.)	X	
American Caribbean Line, Inc	X	
American Export Lines	X	
America France Line	X	
American Gulf Orient Line		X
American Hampton Roads Line	X	
American Pioneer Line:		
Atlantic ports to Australia	X	1935
Atlantic ports to Far East	X	1936
Atlantic ports to India	X	1935
American President Line		X
American Republics Line	X	
American Scantic Line	X	
American South African Line, Inc	X	
American Trading & Shipping Company	X	
American West African Line	X	1938
Anchor Line		X
Baltimore Cuba Line	X	
Baltimore Insular Line, Inc	X	
Baltimore Mail Steamship Company	X	1935
Barber Steamship Lines, Inc		X
Belgian Line	X	
Bernstein, Arnold Line	X	
Black Diamond Lines	X	1936
Bristol City Line of Steamships, Ltd	X	1936
Bull Insular Line, Inc	X	
Carriso, Inc	X	
Castle Line		X
Compania Espanola De Navegacion, Maritima S. A	X	
Chilean North American Line		X
Clan Line Steamers, Ltd	X	
Commonwealth & Dominion Line, Ltd.[1]	X	
Companie Generale Transatlantique	X	
Compania Transatlantica	X	
"Cosulich" Societa Triestina Di Navigazione		X
Creole Line		X
Cunard White Star, Ltd.:		
Atlantic ports to England	X	1938
Atlantic ports to Nassau and Havana		X
Dixie Mediterranean Line		X
East Asiatic Company, Ltd		X
Elder Demster Lines, Ltd	X	
Ellermans Wilson Line, Ltd		X

[1] The bill of lading of Commonwealth & Dominion Line, Ltd., provides that freight must be prepaid, or in the alternative, that the consignee pay a penalty of 10% of the freight charge. Neither provision could be applicable under the standard form Government bill.

Carrier	Collect and prepaid freight	Prepaid freight
Fern Line		X
Franco-Iberian Line	X	1935
Furness Bermuda Line		X
Furness Pacific Line		X
Furness Red Cross Line		X
Furness Warren Line		X
Furness West Indies Line		X
Garcia Line	X	
Gdynia-America Line	X	1936
Grace Line:		
United States to West Coast of South America		X
United States to West Coast of South America and Mexico	X	
Gulfstates Steamship Company		X
Gulf West Mediterranean Line		X
Hamburg American	X	
Harrison Line		X
Holland America Line:		
Atlantic ports to Holland	X	1936
Gulf ports to Holland		X
Houston Lines	X	
Italia Line	X	
Interocean Steamship Corporation	X	
Java-New York Line	X	
Kokusai Line		X
Larrinaga		X
Lykes Bros	X	
Manchester Liners, Ltd		X
Meyer, Richard	X	
Mooremack Lines	X	
Navagazione Liberia Triestina		X
North German Lloyd.		
Gulf ports to Germany		X
North Atlantic ports to Germany	X	
Norwegian America Line	X	1936
N. Y. K		X
Ocean Dominion Steamship Corp. (Alcoa SS Co.)	X	
Ocean Steamship Company, Ltd	X	
Oceanic Steamship Company	X	
Odero Line		X
Oriole Lines	X	
O. S. K	X	
Pacific-Australia Direct Line	X	
Pacific Islands Transport Line	X	
Pacific-Orient Express Line	X	
Pacific Republics Line	X	
Panama Mail Steamship Company		X
Phelps Line	X	1936
Prince Line:		
Atlantic ports to South Africa		X
Atlantic ports to South America	1946	X
Red Star Line	X	1935
Royal Netherlands Steamship Company	X	
Scandinavian American Line:		
Gulf ports to Scandinavia		X
North Atlantic ports to Scandinavia	X	1936
Sea Train Lines, Inc	X	
South American Line	X	

Carrier	Collect and prepaid freight	Prepaid freight
South Atlantic Mail Line		X
Southern States Line		X
Standard Fruit & Steamship Company	X	
States Steamship Company		X
Strachen Shipping Company		X
Swedish American Line	X	
Union-Castle Mail SS Co., Ltd. (Union Clan Line)	X	
Union Ocean Transport Co., Ltd		X
Union Steamship Company of New Zealand, Ltd		X
United States Lines:		
New York to Continental Europe	X	
New York to England	1938	X
United States Navigation Company, Inc	X	
Western Canada Steamship Company, Ltd	X	
Wilhelmsen Line:		
Gulf & Atlantic ports to Brazil	X	
Wilhelmsen Line/Swedish American Line:		
Gulf & Atlantic ports to France		X
Gulf & Atlantic ports to Poland		X
Gulf & Atlantic ports to Scandinavia		X
Yankee Line	X	
Yucatan Line	X	

U. S. GOVERNMENT PRINTING OFFICE: 1949